1

LEVI & KORSINSKY, LLP
Adam M. Apton (SBN 316506)

2
Adam C. McCall (SBN 302130)
75 Broadway, Suite 202

3
San Francisco, CA 94111

4
Tel.: (415) 373-1671
Email: aapton@zlk.com

5
        amccall@zlk.com

6
Attorneys for Plaintiff and Counsel for the Class

7
[Additional Counsel on Signature Block]

8

9
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10

11
IN RE TESLA, INC. SECURITIES
LITIGATION

Case No. 3:18-cv-04865-EMC

12
**PLAINTIFF'S SUBMISSION OF
REVISED PROPOSED VERDICT
FORM**

13

14

15

16   In response to the Court's Final Pretrial Order (ECF No. 508) as well as statements made

17   by the Court during the Pretrial Conference held on October 25, 2022, Plaintiff hereby submits a

18   revised proposed verdict form to reflect the directions from the Court. Specifically, Plaintiff has

19   revised his proposed verdict form to reflect the Court's rulings and statements on three issues: (1)

20   that the August 13, 2018 blogpost is not an independently actionable statement; (2) the inclusion

21   of pre-filled amounts of artificial inflation in Tesla stock and convertible bonds; and (3) the use

22   of actual trade data for the determination of price inflation or deflation for Tesla stock options. A

23   revised proposed verdict form is attached hereto as Exhibit A.

24   **August 13, 2018 Blogpost**. In its order, the Court held that statements from the August

25   13 blog post are not independently actionable. ECF No. 508 at 17. Plaintiff had previously

26   proposed a verdict form that included a question for the jury whether or not he had proven his

27   Rule 10b-5 claim based on the August 13, 2018 blogpost. Consistent with the Court's ruling in

28   the Final Pretrial Order, the revised proposed verdict form removes that question.

1   **Pre-filled Amounts.** Both the proposed verdict forms submitted by Plaintiff and

2 Defendants included tables of pre-filled amounts of artificial inflation for Tesla stock and

3 convertible bonds. (ECF Nos. 476-1 at 4; 484 at 9). These numbers reflected the amount of

4 inflation observed by Plaintiff's expert Dr. Michael Hartzmark for those securities during the

5 Class Period. Following comments by the Court, Plaintiff no longer proposes to include the pre-

6 filled amounts of artificial inflation on the verdict form. 10/25/22 Tr. at 140:2-140:8.

7   **Option Damages.** To calculate damages suffered by investors in options on Tesla stock,

8 Plaintiff's expert, Dr. Hartzmark, has proposed applying the widely accepted out-of-pocket

9 methodology to their transactions in Tesla options during the Class Period. *See* Hartzmark

10 11/10/21 Rep. at ¶¶ 4(6), 214, 222, 228. Under this methodology, damages per share consists of

11 "the difference between the actual purchase price of the security and what would have been the

12 purchase price of the security had there been no fraud or misrepresentation." Hartzmark 11/10/21

13 Report at ¶ 207; *id.* at ¶ 228 (discussing "the standard 'out-of-pocket' method of calculating

14 damages . . . involves a measure of the net minute-by-minute or daily inflation (or deflation) in

15 the price of the option contract at the time of the purchase and at the time of the sale.").

16   Defendants have offered no alternative measure of damages. In applying this

17 methodology to options, Dr. Michael Hartzmark, relying on the analysis of Prof. Steven Heston:

18 (1) utilized the well-accepted Black-Scholes-Merton model to derive the "but-for" price of the

19 Tesla options (the price if there had been no fraud); and (2) made adjustments to the actual traded

20 prices to account for market noise and other confounding information. Professor Heston and Dr.

21 Hartzmark both acknowledged, however, that actual unadjusted market prices could also be used.[1]

22 [1] Heston 11/8/21 Rep. at ¶ 163 (noting "to calculate the impact on traded options . . . [o]ne
23 possibility is to calculate a unique but-for price, and then compare that to the transacted price.").
   Hartzmark 11/10/21 Rep. at ¶¶ 217-223 (noting that the impact quantum is "consistent with the
24 out-of-pocket damages methodology for options I presented in the Class Certification Report" but
   noting the use of revalued option prices as opposed to actual prices given the benefits of the
25 impact quantum and indicating where the observed option prices would replace the Re-Valued
   Fitted Option Value); *see also* Hartzmark 3/18/22 Dep. Tr. at 298:21-299:1 (noting that to the
26 "extent that these values [in Appendix 8 showing the levels of inflation or deflation in Tesla
   options] are replaced, say, for example, with defendants' values, then the methodology and the
27 out-of-pocket methodology to calculate damage would remain the same"); Hartzmark 11/10/21
28 Rep. at ¶ 13 ("OPINION 5: Based on a formulaic procedure that can accommodate any

1   In moving to exclude Dr. Hartzmark's opinions, Defendants argued that no adjustments should

2   be made to actual market data when calculating damages for Tesla stock options. *See* 10/25/22

3   Tr. at 40:9-42:7.

4   In its order, the Court held that (1) the use of the Black-Scholes-Merton model for

5   calculation of the "but-for" option price was appropriate; and (2) accepted that Plaintiff would

6   instead use actual transacted prices to calculate damages for traders in Tesla stock options. 12/7/22

7   Order at 47, 51. Consistent with this ruling, Plaintiff proposes that damages for investors in Tesla

8   stock options be calculated using the out-of-pocket methodology using the Black-Scholes-Merton

9   model to calculate the but-for price for Tesla stock options and this but-for price should be

10   calculated using the but-for price of Tesla stock as determined by the jury at trial and the actual

11   observed implied volatility as reported by the CBOE Exchange on the date the option was

12   transacted during the Class Period.

13   Plaintiff's proposed approach is also consistent with Defendants' position that Professor

14   Heston needed to use "actual prices" for Tesla options. First, in Defendants' motion to exclude

15   the opinions of Professor Heston and Dr. Hartzmark's opinions that rely upon them, Defendants

16   repeatedly argued that Dr. Hartzmark and Professor Heston opinions were unreliable because the

17   impact quantum did not use "actual prices" of Tesla options to calculate damages. ECF No. 479,

18   at 1:8-13 (taking issue that "Heston does not compare actual Tesla option prices or quotes with

19   'but for' prices, as is standard, accepted practice."); 3:15 (faulting Heston for not using the actual

20   traded options prices or the bid-ask quotes contained in the CBOE Exchange options data); 3:16-

21   18 (concluding that "[t]he result of Heston's decision not to use actual transaction prices or quotes

22   . . .is that both the theoretical prices he calculated, and the differences between them, are

23   ***demonstrably wrong***."); 3:21-26 (discussing an example from Defendants' expert Professor

24   Seru's rebuttal report in which he criticized Dr. Hartzmark's calculated level of artificiality of a

25

26   modification determined to be necessary by the finder of fact, I calculate the levels of artificial

27   inflation (or deflation) in all of Tesla's securities that are related to Plaintiff's allegations for the
close on each day of the Class Period as presented in Table 1 through Table 3."); *id.* at ¶ 4(2) n.9

28   (discussing that the framework for estimating damages "offer flexibility in that alternative figures
can be used if additional evidence is presented");

1   Tesla option by arguing that "had Heston calculated, and Hartzmark used, the implied volatility

2   of the particular option being analyzed—rather than that of Heston's ATM forward straddle—he

3   would have concluded that the option price was actually inflated[.]"); 5:9-13 (concluding that the

4   methodology for calculating damages on Tesla options was unreliable because "[e]ven though

5   [Heston] had access to actual market prices and quotes for Tesla options during the class period,

6   he largely ignored them.").[2] Second, Defendants' arguments are complementary to the opinions

7   of their expert, Professor Amit Seru, who criticized Professor Heston's methodology and Dr.

8   Hartzmark's implementation of it to calculate damages on Tesla options because Professor Heston

9   "fails to use actual prices in the actual world to measure damages and consequently fails to

10   reliably estimate the difference between actual and but-for prices"). Seru 12/8/21 Rep. at ¶ 8; *see*

11   *id.* at ¶¶ 27-32 (section titled "Professor Heston's methodology fails to use actual prices in the

12   actual world to measure damages and fails to reliably estimate the difference between actual and

13   but-for prices"); *id.* at ¶¶ 22-26 (criticizing Professor Heston's use of a constant implied volatility

14   by expiry because it does not use the actual "implied volatilities of the particular option being

15   analyzed").[3] Thus, Plaintiff's proposed use of using actual option prices and the CBOE's implied

16   volatilities for these "actual prices" obviates the issues raised by Defendants and is in accord with

17   Defendants' argument that no adjustments should be made to actual market data when calculating

18   damages for Tesla stock options. *See* 10/25/22 Tr. at 40:9-42:7; 45:14-24.

19

20

21   ―――――――――――

22   [2] *See also id.* at 2:6-12 (arguing that Heston used theoretical instruments and the implied
     volatilities calculated therefrom rather than instruments "actually traded in the market"); 2:23-3:3
     (arguing again that Heston "[r]ather than compare the actual transaction prices of Tesla options
23   during the class period to 'but-for' option prices—as is standard practice" used theoretical option
     instruments and prices); 3:6-9 (noting that Heston "did not rely on actual market prices" for a
24   majority of Tesla options).

25   [3] *See also* Seru 3/22/22 Dep. Tr. at 120:4-121:19 (discussing what the "right implied volatility"
     was for assessing damages stating "[s]o when I say the right implied volatility, basically what I
26   have sort of done here, which is look at implied volatility of each option and shown you that if
     you actually were to take that implied volatility" which Seru calculated from the actual bid/ask
27   quotes of Tesla options); 129:8-11 (criticizing Professor Heston's methodology because the
     modeled prices differed from "actual prices"); 133:1-5 (same); 213:11-15 (same); 230:11-16
28   (same).

1   Plaintiff's proposal will eliminate the requirement for the jury to determine but-for implied

2   volatilities for Tesla options as reflected in Plaintiff's initial proposed verdict form. This question

3   has now been removed from the revised verdict form.

4   Plaintiff is available to discuss the issue further with the Court at the Court's convenience.[4]

5

6   Dated: December 20, 2022   Respectfully submitted,

7
                                                 LEVI & KORSINSKY, LLP
8

9
                                                  s/ Adam M. Apton
10   Adam M. Apton (SBN 316506)
                                                 Adam C. McCall (SBN 302130)
11   75 Broadway, Suite 202
                                                 San Francisco, CA 94111
12   Tel.: (415) 373-1671
                                                 Email: aapton@zlk.com
13   Email: amccall@zlk.com

14   -and-

15
                                                 Nicholas I. Porritt
16   Elizabeth K. Tripodi
                                                 Alexander A. Krot III
17   LEVI & KORSINSKY, LLP
                                                 1101 30th Street N.W., Suite 115
18   Washington, D.C. 20007
                                                 Tel.: (202) 524-4290
19   Email: nporritt@zlk.com
                                                 Email: etripodi@zlk.com
20   Email: akrot@zlk.com
                                                 (admitted *pro hac vice*)
21

22   -and-

23
                                                 Joseph Levi
24   Eduard Korsinsky
                                                 LEVI & KORSINSKY, LLP
25

26   _____
     [4] Plaintiff objects to Defendants' proposed revised verdict form filed earlier this afternoon. ECF
27   No. 511. The verdict form departs materially from the version they initially submitted on
     September 20, 2022 (ECF No. 484) in ways that are unrelated to the Court's Final Pretrial
28   Conference Order (ECF No. 508). Plaintiff will be submitting a response to Defendants' proposed
     revised verdict form forthwith.

55 Broadway, 10th Floor
New York, New York 10006
Tel.: (212) 363-7500
Email: jlevi@zlk.com
Email: ek@zlk.com
(admitted *pro hac vice*)

Attorneys for Plaintiff and Counsel for the Class